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Federal Trade Commission  
7

8  
9 IN THE UNITED STATES DISTRICT COURT  
10 FOR THE SOUTHERN DISTRICT OF CALIFORNIA

11 FEDERAL TRADE COMMISSION, )  
12 )

13 Plaintiff, )

14 v. )

15 AUCTIONSAVER, LLC; )

16 RICHARD PHIM; )

17 CARMAN LEE CALDWELL; )

18 SHADE DELMER, )

aka SHANE DELMER; and )

19 NAOMI RUTH ANDERSON, )

20 Defendants. )  
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Case No. 00cv2125 (L)(JFS)

STIPULATED FINAL JUDGMENT AND  
ORDER FOR PERMANENT INJUNCTION  
AS TO DEFENDANTS RICHARD PHIM  
AND CARMAN LEE CALDWELL

Plaintiff Federal Trade Commission ("Commission" or "FTC")  
filed a Complaint for a permanent injunction and other equitable  
relief pursuant to Sections 13(b) and 19 of the Federal Trade  
Commission Act ("FTC Act"), 15 U.S.C. §§ 53(b) and 57b. The  
Complaint charged defendants with violations of Section 5(a) of  
the FTC Act, as amended, 15 U.S.C. § 45(a), and the Commission's  
Trade Regulation Rule entitled "Mail or Telephone Order  
Merchandise Rule" (the "Rule"), 16 C.F.R. Part-435.

FILED  
02 APR 23 AM 10:06  
CLERK, U.S. DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
*Mumery*  
DEPUTY

ORIGINAL

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ENTERED ON 4-24-02

1 Plaintiff Commission and Defendants Phim and Caldwell have  
2 agreed to entry of this Stipulated Final Judgment and Order for  
3 Permanent Injunction ("Order") by the Court to resolve all matters  
4 in dispute as to Defendants Phim and Caldwell in this action.  
5 Defendants Phim and Caldwell have consented to entry of this Order  
6 without trial or adjudication of any issue of law or fact herein  
7 and have agreed that entry of this Order in the docket by the  
8 Court will constitute notice to them of the terms and conditions  
9 of the Order. Plaintiff and Defendants Phim and Caldwell having  
10 requested the Court to enter this Order, the Court hereby finds  
11 and orders as follows:

12 FINDINGS

13 1. This is an action by the Commission instituted under  
14 Sections 13(b) and 19 of the FTC Act in connection with  
15 Defendants' advertising, sale, and offering for sale of computer  
16 hardware and consumer electronics. The Complaint seeks permanent  
17 injunctive relief against Defendants.

18 2. This Court has jurisdiction of the subject matter of  
19 this case and over Defendants Phim and Caldwell. Venue in the  
20 Southern District of California is proper.

21 3. The Complaint states a claim upon which relief may be  
22 granted against Defendants Phim and Caldwell under Sections 5(a),  
23 13(b) and 19 of the FTC Act, 15 U.S.C. §§ 45(a), 53(b) and 57b,  
24 and Sections 435.1(a)(1), 435.1(b)(1), and 435.1(c) of the  
25 Commission's Mail and Telephone Order Merchandise Rule, 16 C.F.R.  
26 §§ 435.1(a)(1), 435.1(b)(1), and 435.1(c).  
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1 C. The term "Defendants" refers to Defendants Phim and  
2 Caldwell and the agents, servants, employees, and attorneys of  
3 either of them, and all persons or entities directly or indirectly  
4 under the control of either of them, and all other persons or  
5 entities in active concert or participation with either of them  
6 who receive actual notice of this Order by personal service or  
7 otherwise, and each such person.

8  
9 ORDER

10 I.

11 **PROHIBITED MISREPRESENTATIONS**

12 **IT IS FURTHER ORDERED**, in connection with the advertising,  
13 marketing, promoting, offering for sale, or sale of any good or  
14 service, regardless of whether the Internet is involved, that:

15 A. Defendants Phim and Caldwell, and the agents, servants,  
16 employees, and attorneys of either of them, and all persons or  
17 entities directly or indirectly under the control of either of  
18 them, and all other persons or entities in active concert or  
19 participation with either of them who receive actual notice of  
20 this Order by personal service or otherwise, and each such person,  
21 whether acting directly or through any corporation, limited  
22 liability company, subsidiary, division or other device, **are**  
23 **hereby permanently restrained and enjoined from** misrepresenting,  
24 expressly or by implication, that such good or service will be  
25 delivered or provided to any consumer upon receipt of payment from  
26 the consumer; and

27 B. Defendants Phim and Caldwell, and the agents, servants,  
28 employees, and attorneys of either of them, and all persons or

1 entities directly or indirectly under the control of either of  
2 them, and all other persons or entities in active concert or  
3 participation with either of them who receive actual notice of  
4 this Order by personal service or otherwise, and each such person,  
5 whether acting directly or through any corporation, limited  
6 liability company, subsidiary, division or other device, **are**  
7 **hereby permanently restrained and enjoined from** misrepresenting,  
8 expressly or by implication, any other fact material to a  
9 consumer's decision to buy or accept the good or service from any  
10 of the **Named Defendants**.

11 II.

12 **PROHIBITION ON VIOLATING MAIL AND TELEPHONE ORDER SALES RULE**

13 **IT IS FURTHER ORDERED**, in connection with any sales in which  
14 the buyer has ordered merchandise from any of the **Named Defendants**  
15 by mail or telephone, including by fax or over the Internet, that  
16 Defendants Phim and Caldwell and the agents, servants, employees,  
17 and attorneys of either of them, and all persons or entities  
18 directly or indirectly under the control of either of them, and  
19 all other persons or entities in active concert or participation  
20 with either of them who receive actual notice of this Order by  
21 personal service or otherwise, and each such person, whether  
22 acting directly or through any corporation, limited liability  
23 company, subsidiary, division or other device, **are hereby**  
24 **permanently restrained and enjoined from:**

25 1. Violating Section 435.1(a)(1) of the Rule, 16  
26 C.F.R. § 435.1(a)(1), by soliciting orders for the sale of  
27 merchandise to be ordered by the buyer through the mails or by  
28 telephone without a reasonable basis to expect that **Defendants**



1 this Order, transfer to the Commission Ten Thousand Dollars  
2 (\$10,000) by wire transfer, to an account designated by counsel  
3 for the Commission, or by certified check. *Provided further that,*  
4 in the event the Commission files a satisfaction of judgment upon  
5 payment of \$10,000, said satisfaction shall be subject to  
6 revocation as set forth in Section V of this Order.

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8 **IV.**

9 **USE OF CONSUMER REDRESS AND DISGORGEMENT FUNDS**

10 **IT IS FURTHER ORDERED** that:

11 A. The funds received from Defendants Phim and Caldwell  
12 shall be used to provide redress to injured consumers and to pay  
13 expenses of administering the redress fund, or in accordance with  
14 Paragraph B of this Section;

15 B. If the Commission determines, in its sole discretion,  
16 that redress to consumers is wholly or partially impracticable,  
17 any funds not so used shall be deposited into the United States  
18 Treasury, or may be used to educate consumers affected by the  
19 practices set forth in the Commission's Complaint in this matter.  
20 Defendant Phim and Defendant Caldwell shall have no right to  
21 contest the manner of distribution chosen by the Commission;

22 C. If the Commission determines that payment of redress to  
23 consumers is not impracticable, the Commission shall submit a plan  
24 for the disbursement of funds to the Court for review and  
25 approval. In establishing this plan, the Commission shall have  
26 full and sole discretion to determine the criteria and parameters  
27 for participation by injured consumers in a redress program, and  
28 may delegate any and all tasks connected with such redress program  
to any individuals, partnerships, or corporations, and pay the

1 fees, salaries, and expenses incurred thereby in carrying out said  
2 tasks from the funds received pursuant to this Order.

3 V.

4 RIGHT TO REOPEN AND TERMINATE SUSPENSION

5 IT IS FURTHER ORDERED that the Commission's agreement to this  
6 Order is expressly premised upon the truthfulness, accuracy and  
7 completeness of the eighteen-page financial statement dated  
8 December 6, 2001 that Defendant Phim has submitted to the  
9 Commission and the eighteen-page financial statement dated  
10 December 6, 2001, as well as all attachments, that Defendant  
11 Caldwell has submitted to the Commission. Said financial  
12 statements contain material information upon which the FTC has  
13 relied in negotiating and agreeing to the terms of this Order.  
14 If, upon motion by the Commission to the Court, the Court finds  
15 that Defendant Phim or Defendant Caldwell failed to disclose any  
16 material asset with a value exceeding \$1,000, or materially  
17 misrepresented the value of any asset, or made any other material  
18 misrepresentation in or omission from his financial statement, any  
19 satisfaction of judgment that the Commission has filed as to that  
20 defendant will be revoked and the entire judgment amount of  
21 \$90,000, less any amounts any defendant has previously paid to the  
22 Commission, will be immediately due and payable. For purposes of  
23 this Section, and any subsequent proceedings to enforce payment,  
24 including but not limited to a non-dischargeability complaint  
25 filed in a bankruptcy proceeding, Defendants Phim and Caldwell  
26 stipulate to all of the allegations in the Commission's Complaint.



1 VI.

2 ACKNOWLEDGMENT OF RECEIPT

3 IT IS FURTHER ORDERED that, within five (5) business days  
4 after entry of this Order, Defendants Phim and Caldwell shall each  
5 submit to the Commission a truthful sworn and notarized statement,  
6 in the form shown on Appendix 1, that shall acknowledge receipt of  
7 this Order as approved by the Court.

8 VII.

9 RECORD KEEPING PROVISIONS

10 IT IS FURTHER ORDERED that, for a period of five (5) years  
11 from the date of entry of this Order, Defendants Phim and  
12 Caldwell, in connection with any and every business entity of  
13 which the defendant is a majority owner, or which he otherwise  
14 manages or controls, and which is engaged in the advertising,  
15 marketing, sale or offering for sale of any good or service via  
16 the Internet, are hereby restrained and enjoined from:

17 A. Failing to create the following records:

18 1. Accounting records that, in reasonable detail,  
19 accurately and fairly reflect the cost of goods or services sold,  
20 revenues generated, and the disbursement of such revenues;

21 2. Personnel records accurately reflecting the name,  
22 address, and telephone number of each person employed in any  
23 capacity by such business, including as an independent contractor;  
24 that person's job title or position; the date upon which the  
25 person commenced work; and the date and reason for the person's  
26 termination, if applicable. The businesses subject to this  
27 Paragraph shall retain such records for any terminated employee  
28 for a period of three (3) years following the date of termination;



1 defendant is affiliated with or employed by, a statement of the  
2 nature of the business, and a statement of the defendant's duties  
3 and responsibilities in connection with the business or  
4 employment;

5 B. Defendants Phim and Caldwell shall, for a period of four  
6 (4) years from the date of entry of this Order, notify the  
7 Commission of any proposed change in the structure of any business  
8 entity (including Defendant Auctionsaver, LLC) that is owned or  
9 controlled by the defendant, such as creation, incorporation,  
10 dissolution, assignment, sale, merger, creation or dissolution of  
11 subsidiaries, proposed filing of a bankruptcy petition, or change  
12 in the company name or address, or any other change that may  
13 affect compliance obligations arising out of this Order, thirty  
14 (30) days prior to the effective date of any proposed change;

15 C. One hundred eighty (180) days after the date of entry of  
16 this Order, Defendants Phim and Caldwell shall each provide a  
17 written report to the Commission, sworn to under penalty of  
18 perjury, setting forth in detail the manner and form in which the  
19 defendant has complied and is complying with this Order. This  
20 report shall include but not be limited to:

- 21 1. The defendant's then current residence address and  
22 telephone number(s);
- 23 2. The defendant's then current employment, business  
24 addresses and telephone numbers, a description of  
25 the business activities of each such employer, and  
26 the defendant's title and responsibilities for each  
27 employer;

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1 individually or jointly, own a majority interest in the business  
2 or directly or indirectly manage or control the business. In  
3 providing such access, Defendants Phim and Caldwell shall permit  
4 representatives of the Commission to inspect and copy all  
5 **documents** relevant to any matter contained in this Order; and  
6 shall permit Commission representatives to remove **documents**  
7 relevant to any matter contained in this Order so that the  
8 **documents** may be inspected, inventoried, and copied. Provided,  
9 however, that any documents removed must be returned within five  
10 business days; and

11 B. To interview the officers, directors, and employees,  
12 including all personnel involved in responding to consumer  
13 complaints or inquiries, and all sales personnel, whether  
14 designated as employees, consultants, independent contractors or  
15 otherwise, of any business to which Subsection A of this Paragraph  
16 applies, concerning matters relating to compliance with the terms  
17 of this Order. The person interviewed may have counsel present.  
18 *Provided, however,* that this provision shall not be construed as a  
19 waiver of any right against self incrimination as protected by the  
20 Fifth Amendment to the U.S. Constitution. *Provided further that,*  
21 upon application of the Commission and for good cause shown, the  
22 Court may enter an *ex parte* order granting immediate access to all  
23 premises at which Defendant Phim or Defendant Caldwell conducts  
24 business or stores **documents**, for the purposes of inspecting and  
25 copying all **documents** relevant to any matter contained in this  
26 Order.

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1 X.

2 **FTC'S AUTHORITY TO MONITOR COMPLIANCE**

3 **IT IS FURTHER ORDERED** that the Commission is authorized to  
4 monitor Defendant Phim's and Defendant Caldwell's compliance with  
5 this Order by all lawful means, including, but not limited to, the  
6 following:

7 A. The Commission is authorized, without further leave of  
8 this Court, to obtain discovery from any person in the manner  
9 provided by Chapter V of the Federal Rules of Civil Procedure,  
10 Fed. R. Civ. P. 26-37, including the use of compulsory process  
11 pursuant to Federal R. Civ. P. 45, for the purpose of  
12 investigating either defendant's compliance with any provision of  
13 this Order;

14 B. The Commission is authorized, without the necessity of  
15 prior notice, to use representatives posing as customers or  
16 prospective customers of Defendant Phim or Defendant Caldwell,  
17 their employees, or any other entity managed or controlled in  
18 whole or in part by either defendant;

19 C. Nothing in this Order shall limit the Commission's  
20 lawful use of compulsory process, pursuant to Sections 9 and 20 of  
21 the FTC Act, 15 U.S.C. §§ 49, 57b-1, for the purpose of  
22 investigating compliance with this Order, Section 5 of the FTC  
23 Act, 15 U.S.C. § 45, or the Rule, 16 C.F.R. Part 435.

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XI.

ORDER DISTRIBUTION

IT IS FURTHER ORDERED that, for a period of four (4) years from the date of entry of this Order, Defendant Phim and Defendant Caldwell shall:

A. Immediately provide a copy of this Order to, and obtain a signed and dated acknowledgment of receipt of the same from, each officer, director and managing agent of any company or other business entity which is directly or indirectly owned, operated or controlled by the defendant and which (i) is engaged in the advertising, marketing, sale or offering for sale of any good or service via the Internet, or (ii) solicits orders for the sale of merchandise to be ordered by the buyer through the mails or by telephone or fax; and

B. Maintain for a period of three years after creation, and upon reasonable notice make available to the FTC's representatives, the original signed and dated acknowledgments of the receipt of copies of this Order, as required by this Subsection A of this Paragraph.

XII.

NOTICES

IT IS FURTHER ORDERED that for purposes of this Order, Defendants Phim and Caldwell shall, unless otherwise directed by the Commission's authorized representatives, mail all written notifications to the Commission to:

1 ASSISTANT REGIONAL DIRECTOR  
2 Federal Trade Commission  
3 Western Region-Los Angeles  
4 10877 Wilshire Blvd., Ste. 700  
5 Los Angeles, CA 90024  
6 Re: FTC v. Auctionsaver, LLC

7 **XIII.**

8 **INDEPENDENCE OF OBLIGATIONS**

9 **IT IS FURTHER ORDERED** that each of the obligations imposed by  
10 this Order is independent of all other obligations under the  
11 Order, and that the expiration of any requirements imposed by this  
12 Order shall not affect any other obligation arising under this  
13 Order.

14 **XIV.**

15 **COSTS AND ATTORNEYS FEES**

16 **IT IS FURTHER ORDERED** that each party to this Order bear its  
17 own costs and attorneys fees incurred in connection with this  
18 action.

19 **XV.**

20 **CONTINUED JURISDICTION**

21 **IT IS FURTHER ORDERED** that this Court shall retain  
22 jurisdiction of this matter for all purposes.  
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XVI.

ENTRY BY CLERK

There being no just reason for delay, the Clerk of the Court is hereby directed to enter this Order.

SO STIPULATED:

FEDERAL TRADE COMMISSION

Dated: April 19, 2002<sup>nd</sup>

John D. Jacobs  
John D. Jacobs  
Barbara Y.K. Chun  
Attorneys for Plaintiff

Dated: Dec 19, 2001, 2001

Richard Phim  
Richard Phim  
Defendant

Dated: DEC 19, 2001, 2001

Carman Lee Caldwell  
Carman Lee Caldwell  
Defendant

APPROVED AS TO FORM:

Dated: 12/19/01, 2001

Ned Lynch  
Ned Lynch  
Attorney for Defendants Phim  
and Caldwell

IT IS SO ORDERED.

Dated: April 22, 2002

James Peng  
Judge of the District Court

**PART 435—MAIL OR TELEPHONE  
ORDER MERCHANDISE**

- Sec. 435.1 The rule.
- 435.2 Definitions.
- 435.3 Limited applicability.
- 435.4 Effective date of the rule.

AUTHORITY: 15 U.S.C. 57a; 5 U.S.C. 552.

SOURCE: 58 FR 49121, Sept. 21, 1993, unless otherwise noted.

**§ 435.1 The rule.**

In connection with mail or telephone order sales in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition, and an unfair or deceptive act or practice for a seller:

(a)(1) To solicit any order for the sale of merchandise to be ordered by the buyer through the mails or by telephone unless, at the time of the solicitation, the seller has a reasonable basis to expect that it will be able to ship any ordered merchandise to the buyer:

(i) Within that time clearly and conspicuously stated in any such solicitation, or

(ii) if no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer. Provided, however, where, at the time the merchandise is ordered the buyer applies to the seller for credit to pay for the merchandise in whole or in part, the seller shall have 50 days, rather than 30 days, to perform the actions required in § 435.1(a)(1)(ii) of this part.

(2) To provide any buyer with any revised shipping date, as provided in paragraph (b) of this section, unless, at the time any such revised shipping

date is provided, the seller has a reasonable basis for making such representation regarding a definite revised shipping date.

(3) To inform any buyer that it is unable to make any representation regarding the length of any delay unless (1) the seller has a reasonable basis for so informing the buyer and (ii) the seller informs the buyer of the reason or reasons for the delay.

(4) In any action brought by the Federal Trade Commission, alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this part will create a rebuttable presumption that the seller lacked a reasonable basis for any expectation of shipment within said applicable time.

(b)(1) Where a seller is unable to ship merchandise within the applicable time set forth in paragraph (a)(1) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel the buyer's order and receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of its inability to ship within the applicable time set forth in paragraph (a)(1) of this section, but in no event later than said applicable time.

(1) Any offer to the buyer of such an option shall fully inform the buyer regarding the buyer's right to cancel the order and to obtain a prompt refund and shall provide a definite revised shipping date, but where the seller lacks a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the delay.

(1) Where the seller has provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in paragraph (a)(1) of this section, the offer of said option shall expressly inform the buyer that, unless the seller receives, prior to shipment and prior to the expiration of

the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(iii) Where the seller has provided a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or where the seller is unable to provide a definite revised shipping date and therefore informs the buyer that it is unable to make any representation regarding the length of the delay, the offer of said option shall also expressly inform the buyer that the buyer's order will automatically be deemed to have been cancelled unless:

(A) The seller has shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and has received no cancellation prior to shipment, or

(B) The seller has received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the seller informs the buyer that it is unable to make any representation regarding the length of the delay, the buyer shall be expressly informed that, should the buyer consent to an indefinite delay, the buyer will have a continuing right to cancel the buyer's order at any time after the applicable time set forth in paragraph (a)(1) of this section by so notifying the seller prior to actual shipment.

(iv) Nothing in this paragraph shall prohibit a seller who furnishes a definite revised shipping date pursuant to paragraph (b)(1)(i) of this section, from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to paragraph (b)(1) of this section, the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date in the form of a response from the buyer specifically consenting to said further delay. Provided, however, that where the seller solicits consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should the buyer so consent to an indefinite delay, the buyer shall have a continuing right to cancel the

buyer's order at any time after the definite revised shipping date by so notifying the seller prior to actual shipment.

(2) Where a seller is unable to ship merchandise on or before the definite revised shipping date provided under paragraph (b)(1)(i) of this section and consented to by the buyer pursuant to paragraph (b)(1) (i) or (iii) of this section, to fail to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further delay or to cancel the order and to receive a prompt refund. Said offer shall be made within a reasonable time after the seller first becomes aware of its inability to ship before the said definite revised date, but in no event later than the expiration of the definite revised shipping date: Provided, however, that where the seller previously has obtained the buyer's express consent to an unanticipated delay until a specific date beyond the definite revised shipping date, pursuant to paragraph (b)(1)(iv) of this section or to a further delay until a specific date beyond the definite revised shipping date pursuant to paragraph (b)(2) of this section, that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of paragraph (b)(2) of this section.

(i) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where the seller lacks a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that the seller is unable to make any representation regarding the length of the further delay.

(ii) The offer of a renewed option shall expressly inform the buyer that, unless the seller receives, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer specifically consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if the seller is in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite

revised shipping date: Provided, however, that where the seller offers the buyer the option to consent to an indefinite delay the offer shall expressly inform the buyer that, should the buyer so consent to an indefinite delay, the buyer shall have a continuing right to cancel the buyer's order at any time after the old definite revised shipping date or any date superseding the old definite revised shipping date.

(iii) Paragraph (b)(2) of this section shall not apply to any situation where a seller, pursuant to the provisions of paragraph (b)(1)(iv) of this section, has previously obtained consent from the buyer to an indefinite extension beyond the first revised shipping date.

(3) Wherever a buyer has the right to exercise any option under this part or to cancel an order by so notifying the seller prior to shipment, to fail to furnish the buyer with adequate means, at the seller's expense, to exercise such option or to notify the seller regarding cancellation.

Nothing in paragraph (b) of this section shall prevent a seller, where it is unable to make shipment within the time set forth in paragraph (a)(1) of this section or within a delay period consented to by the buyer, from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after it becomes aware of said inability to ship, together with a prompt refund.

(c) To fail to deem an order cancelled and to make a prompt refund to the buyer whenever:

(1) The seller receives, prior to the time of shipment, notification from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this part;

(2) The seller has, pursuant to paragraph (b)(1)(ii) of this section, provided the buyer with a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph (a)(1) of this section or has notified the buyer that it is unable to make any representation regarding the length of the delay and the seller

(i) Has not shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph (a)(1) of this section, and

(ii) Has not received the buyer's express consent to said shipping delay within said thirty (30) days;

(3) The seller is unable to ship within the applicable time set forth in paragraph (b)(2) of this section, and has not received, within the said applicable time, the buyer's consent to and further delay;

(4) The seller has notified the buyer of its inability to make shipment and has indicated its decision not to ship the merchandise;

(5) The seller fails to offer the option prescribed in paragraph (b)(1) of this section and has not shipped the merchandise within the applicable time set forth in paragraph (a)(1) of this section.

(d) In any action brought by the Federal Trade Commission, alleging a violation of this part, the failure of a respondent-seller to have records or other documentary proof establishing its use of systems and procedures which assure compliance, in the ordinary course of business, with any requirement of paragraphs (b) or (c) of this section will create a rebuttable presumption that the seller failed to comply with said requirement.

**§ 435.2 Definitions.**

For purposes of this part:

(a) *Mail or telephone order sales* shall mean sales in which the buyer has ordered merchandise from the seller by mail or telephone, regardless of the method of payment or the method used to solicit the order.

(b) *Telephone* refers to any direct or indirect use of the telephone to order merchandise, regardless of whether the telephone is activated by, or the language used is that of human beings, machines, or both.

(c) *Shipment* shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(d) *Receipt of a properly completed order* shall mean, where the buyer tenders full or partial payment in the proper amount in the form of cash, check, money order, or authorization from the buyer to charge an existing charge account, the time at which the seller receives both said payment and an order from the buyer containing all of the information needed by the seller to process and ship the order. Provided,

however. That where the seller receives notice that the check or money order tendered by the buyer has been dishonored or that the buyer does not qualify for a credit sale, *receipt of a properly completed order* shall mean the time at which:

(i) The seller receives notice that a check or money order for the proper amount tendered by the buyer has been honored,

(ii) The buyer tenders cash in the proper amount, or

(iii) The seller receives notice that the buyer qualifies for a credit sale.

(e) *Refund* shall mean:

(1) Where the buyer tendered full payment for the unshipped merchandise in the form of cash, check or money order, a return of the amount tendered in the form of cash, check or money order;

(2) Where there is a credit sale:

(i) And the seller is a creditor, a copy of a credit memorandum or the like or an account statement reflecting the removal or absence of any remaining charge incurred as a result of the sale from the buyer's account;

(ii) And a third party is the creditor, a copy of an appropriate credit memorandum or the like to the third party creditor which will remove the charge from the buyer's account or a statement from the seller acknowledging the cancellation of the order and representing that it has not taken any action regarding the order which will result in a charge to the buyer's account with the third party;

(iii) And the buyer tendered partial payment for the unshipped merchandise in the form of cash, check or money order, a return of the amount tendered in the form of cash, check or money order.

(f) *Prompt refund* shall mean:

(1) Where a refund is made pursuant to paragraph (e) (1) or (2)(iii) of this section, a refund sent to the buyer by first class mail within seven (7) working days of the date on which the buyer's right to refund vests under the provisions of this part;

(2) Where a refund is made pursuant to paragraph (e)(2) (1) or (1) of this section, a refund sent to the buyer by first class mail within one (1) billing cycle from the date on which the buyer's

right to refund vests under the provisions of this part.

(g) The *time of solicitation* of an order shall mean that time when the seller has:

(1) Mailed or otherwise disseminated the solicitation to a prospective purchaser,

(2) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like or on radio or television which cannot be changed or cancelled without incurring substantial expense, or

(3) Made arrangements for the printing of a catalog, brochure or the like which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.

[58 FR 49121, Sept. 21, 1993, as amended at 60 FR 56960, Nov. 13, 1995]

**§ 435.3 Limited applicability.**

(a) This part shall not apply to:

(1) Subscriptions, such as magazine sales, ordered for serial delivery, after the initial shipment is made in compliance with this part.

(2) Orders of seeds and growing plants.

(3) Orders made on a collect-on-delivery (C.O.D.) basis.

(4) Transactions governed by the Federal Trade Commission's Trade Regulation Rule entitled "Use of Negative Option Plans by Sellers in Commerce," 16 CFR part 425.

(b) By taking action in this area:

(1) The Federal Trade Commission does not intend to preempt action in the same area, which is not inconsistent with this part, by any State, municipal, or other local government. This part does not annul or diminish any rights or remedies provided to consumers by any State law, municipal ordinance, or other local regulation, insofar as those rights or remedies are equal to or greater than those provided by this part. In addition, this part does not supersede those provisions of any State law, municipal ordinance, or other local regulation which impose obligations or liabilities upon sellers, when sellers subject to this part are not in compliance therewith.

(2) This part does supersede those provisions of any State law, municipal

ordinance, or other local regulation which are inconsistent with this part to the extent that those provisions do not provide a buyer with rights which are equal to or greater than those rights granted a buyer by this part. This part also supersedes those provisions of any State law, municipal ordinance, or other local regulation requiring that a buyer be notified of a right which is the same as a right provided by this part but requiring that a buyer be given notice of this right in a language, form, or manner which is different in any way from that required by this part. In those instances where any State law, municipal ordinance, or other local regulation contains provisions, some but not all of which are partially or completely superseded by this part, the provisions or portions of those provisions which have not been superseded retain their full force and effect.

(c) If any provision of this part, or its application to any person, partnership, corporation, act or practice is held invalid, the remainder of this part or the application of the provision to any other person, partnership, corporation, act or practice shall not be affected thereby.

(c) If any provision of this part, or its application to any person, partnership, corporation, act or practice is held invalid, the remainder of this part or the application of the provision to any other person, partnership, corporation, act or practice shall not be affected thereby.

**§ 435.4 Effective date of the rule.**

The original rule, which became effective 100 days after its promulgation on October 22, 1975, remains in effect. The amended rule, as set forth in this part, becomes effective March 1, 1994.